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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHRIS LIPPMAN, Plaintiff/Petitioner, v. DEEMCO INDUSTRIES, LLC, STEVEN V. DEEM, GP III Incorporated, a Utah Corporation, REYNOLDS FINANCIAL, LLC, a Utah limited liability company, DEXTER'S PARTY ICE, LLC, a Utah limited liability company, SBS BUSINESS CONSULTING, OWEN SALKIN, COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY, and JOHN and JANE DOES I-X, Defendants.	Appellate Case No. 20090537 Trial Court No. 060902994

BRIEF OF APPELLEES, OWEN SALKIN AND COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY

Appeal from the Ruling of the Second Judicial District Court,
The Honorable Pamela G. Heffernan

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FILED
UTAH APPELLATE COURTS

PARTIES TO THE PROCEEDINGS BELOW

1. The Plaintiff/Appellant is Chris Lippman, (referred to herein as "Lippman").

2. Defendant/Appellee Owen Salkin is a party to this appeal.

3. Defendant/Appellee Coldwell Banker Residential Brokerage Company is a party to this appeal.

4. Defendants Deemco Industries, LLC, Steven V. Deem and Dexter's Party Ice, LLC (referred to herein collectively as the "Deem Defendants") are not parties to this appeal.

5. Defendant GP III Incorporated is not a party to this appeal.

6. Defendant Reynolds Financial, LLC is not a party to this appeal.

7. Defendant SBS Business Consulting is not a party to this appeal.

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this matter pursuant to Utah Code Annotated § 78A-4-103(2)(j). This case was poured-over by the Utah Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Utah Rules of Civil Procedure

Rule 37. Failure to Make or Cooperate in Discovery; Sanctions

> **(f) Failure to disclose.** If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2).

URCP 37(f) (2009).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Defendants/Appellees, Owen Salkin and Coldwell Banker Residential Brokerage (hereinafter collectively referred to as "Coldwell Banker") are not satisfied with the statement of the issue included in the Appellant's Brief. (App. Br., p. 1). The issue presented for review is:

Did the trial court abuse its discretion when it denied Plaintiff's Third Motion to Amend Scheduling Order to Allow More Time for Disclosure of Experts (hereinafter "Third Motion to Amend Scheduling Order")?

Plaintiff/Appellant, Chris Lippman (hereinafter "Lippman"), distorts the simplicity of the issue presented on appeal by arguing in his statement of the issue that the denial "is tantamount to a dismissal given the necessary nature of the experts to prove the Appellant's case." (App. Br., p. 1). The trial court's denial of the Third Motion to Amend Scheduling Order is not equal to dismissal.

STATEMENT OF CASE/STATEMENT OF FACTS

1. Lippman filed his Complaint in this case on May 30, 2006. (R. 0001).

2. Lippman amended his Complaint on March 7, 2007. (R. 0334).

3. On or about March 19, 2007, the trial court entered a Rule 26(f) Scheduling Order. (R. 0450).

4. On or about October 19, 2007, the trial court entered an Amended Rule 26(f) Scheduling Order. The Amended Rule 26(f) Scheduling Order allowed the parties additional time to conduct discovery. (R. 0614).

5. On or about February 6, 2008, the trial court entered a Second Amended Rule 26(f) Scheduling Order (hereinafter the "Second Amended Scheduling Order"). (R. 1099).

6. The Second Amended Scheduling Order again provided the parties with additional time to conduct discovery. Pursuant to the Second Amended Scheduling Order, the deadline for Lippman's expert designations and reports was April 1, 2008. (R. 1099).

7. On or about March 26, 2008, Lippman filed a Second Amended Complaint. In the Second Amended Complaint, Lippman made no changes to his claims against Coldwell Banker. (R. 1768).

8. On or about April 3, 2008, Lippman filed a Motion to Amend Scheduling Order to Allow More Time for Disclosure of Experts (hereinafter the "First Motion to Amend Scheduling Order"). (R. 1892).

9. Although dated April 1, 2008, Lippman's Motion was actually filed with the trial court two days after the expiration of the expert deadline contained in the Second Amended Scheduling Order. (Id.).

10. In his First Motion to Amend Scheduling Order, Lippman requested that the trial court once again allow him more time to locate and disclose his experts and reports. Lippman sought to extend his expert discovery deadline an additional sixty days, or until May 31, 2008. (R. 1892).

11. In his appellate brief, Lippman refers to this Motion as his "first motion," however it was in actuality his third request to amend and extend the

deadlines contained in the original Rule 26(f) Scheduling Order. (Appellant's Brief, p. 22; R. 1892).

12. While Coldwell Banker had no desire to further delay this case, it did not object to Lippman's First Motion to Amend Scheduling Order as Lippman only requested an additional sixty days based upon what was represented to be extenuating circumstances. (R. 2332).

13. Coldwell Banker disclosed its experts and their reports on April 30, 2008, in compliance with the Second Amended Scheduling Order. (R. pp. 2137-2144)

14. On March 2, 2009, almost an entire year after it was filed and more than nine months after the expiration of what would have been the expert discovery deadline he requested, Lippman belatedly requested that the trial court issue a decision on his First Motion to Amend Scheduling Order decision (hereinafter the "Request to Submit"). (R. 2295).

15. Contemporaneous with the filing of his Request to Submit, Lippman also submitted a proposed Order on his First Motion to Amend Scheduling Order to Allow More Time for Disclosure of Experts (hereinafter the "Proposed Order on First Motion to Amend Scheduling Order"). (R. 2292).

16. In the Proposed Order on First Motion to Amend Scheduling Order, Lippman misled the trial Court by representing that Lippman's First Motion to Amend

Scheduling Order had requested an extension of the expert discovery deadline until March 15, 2009, when in fact, the First Motion to Amend Scheduling Order undisputedly requested an extension only until May 31, 2008. (R. 2292 and 1892).

17. On March 2, 2009, Lippman also filed a Certificate of Service of Plaintiff's Disclosure of Expert Witnesses and Reports. This filing marked the first time in the three-year pendency of this litigation that Lippman had attempted to disclose or designate any expert witnesses in this case or take any action in pursuit of his claims against Coldwell Banker. (R. 2322).

18. On or about March 9, 2009, Coldwell Banker formally objected to both the tardy Request to Submit for Decision and the deceptive Proposed Order Seeking to Amend Scheduling Order to Allow More Time for Disclosure of Experts. (R. 2331).

19. On or about March 13, 2009, Lippman filed a Second Motion to Amend Scheduling Order to Allow More Time for Disclosure of Experts. (R. 2348). In reality, this was actually Lippman's fourth attempt to amend the original Rule 26(f) Scheduling Order. (R. 2348).

20. On or about March 16, 2009, the trial court denied Lippman's First Motion to Amend Scheduling Order noting that "[t]he Motion is stale and, given the age of this case, it would be inappropriate to allow further amendments." (R. 2369).

21. On or about March 24, 2009, Lippman filed "Plaintiff's Withdrawal of Second Motion to Amend Scheduling Order to Allow More Time for Disclosure of Experts". (R. 2374).

22. On that same date, Lippman also filed "Plaintiff's Third Motion to Amend Scheduling Order to Allow More Time for Disclosure of Experts" (hereinafter "Third Motion to Amend Scheduling Order"). (R. 2377).

23. Given that all of the discovery deadlines set forth in the Second Amended Scheduling Order had long since expired, that Coldwell Banker had long been prepared to proceed to trial, and that Lippman had only recently demonstrated a renewed interest in trying his claims against Coldwell Banker, on March 31, 2009, Coldwell Banker certified the case ready for trial and requested a pre-trial conference. (R.2412).

24. On or about June 2, 2009, the trial court conducted a telephonic pre-trial conference wherein the foregoing issues were discussed, and the court set this matter for trial from October 7 - 9, 2009. The trial court also committed to rule expeditiously on Lippman's Third Motion to Amend Scheduling Order. (R. 2438).

25. By a Decision dated June 10, 2009, the trial court denied Lippman's Third Motion to Amend Scheduling Order (hereinafter "Order"). (R. 2441. A true and accurate copy of said Order is included in the addendum of Appellant's Brief.).

SUMMARY OF ARGUMENT

Coldwell Banker's argument on appeal is straightforward. Lippman filed his expert disclosures and reports nearly a year after the expert discovery deadline. The belated reports and disclosures were required to be excluded by the trial court pursuant to operation of Utah R. Civ. P. 37. Lippman had the opportunity to demonstrate good cause to excuse the tardiness of his expert disclosures, however the trial court held that there was no good cause to excuse the tardiness and prejudice that would result if Lippman were allowed to present the expert witnesses and their reports. The trial court did not abuse its discretion when it denied Lippman's Third Motion to Amend Scheduling Order.

ARGUMENT

I. LIPPMAN'S EXPERT WITNESSES WERE EXCLUDED BY OPERATION OF RULE; NOT AS THE RESULT OF A SANCTION OR DISMISSAL IMPOSED BY THE TRIAL COURT.

The subject of this appeal is the trial court's denial of Lippman's Third Motion to Amend Scheduling Order. (R. 2441). Lippman argues that this Court should treat the lower court's denial as both a discovery sanction and a "de facto" dismissal of his claims against Coldwell Banker. (App. Br., pp. 1, 23). However, the Order denying Lippman's Third Motion to Amend is neither a sanction nor a dismissal of Lippman's claims. While the trial court detailed a variety of reasons supporting its denial of Lippman's Third Motion to Amend Scheduling Order, the court made no reference

to its action being a sanction or having dismissed Lippman's claims against Coldwell Banker. (R. 2441).

The Utah Court of Appeals recognizes that a trial court "has great latitude in determining the most efficient and fair manner to conduct the court's business . . ." Normandeau v. Hanson Equipment, Inc., 174 P.3d 1, 7 (Utah App. 2007). Rule 37(f) of the Utah Rules of Civil Procedure provides that:

> If a party fails to disclose a witness, document or other material . . . that party ***shall not*** be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.

URCP 37(f) (2009) (Emphasis added). A trial court's enforcement of its scheduling order and the rules which govern the same is not tantamount to the imposition of a sanction. See Aspenwood, L.L.C. v. C.A.T., L.L.C., 73 P.3d 947, 951 (Utah App. 2003) (internal citation omitted)[1].

A. Utah R. Civ. P. 37(f) Required the Trial Court to Exclude Lippman's Tardy Expert Reports; Exclusion Was Not a Sanction.

This Court recently addressed a nearly identical issue in Posner v. Equity Title Ins. Agency, Inc., 2009 UT App 347. In Posner, the trial court struck Posner's

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In Aspenwood, the trial court's order regarding discovery did not amount to a sanction where party claimed that, due to the court's order, it ran out of time to complete the depositions of several individuals, and therefore, was not able to conduct full and fair discovery. The Court of Appeals affirmed the trial court holding that it was within the trial court's discretion to impose a deposition schedule, that the aggrieved party was granted previous extensions and did not object to the discovery schedule. Id.

designation of his expert because it was untimely. Id., ¶ 6. Thereafter, the trial court granted summary judgment in favor of defendant based on the absence of expert testimony. Id., ¶ 7. Posner appealed the lower court's exclusion of his expert report and its grant of summary judgment. In affirming the lower court's exclusion of Posner's expert, the Court of Appeals made clear that "[t]he trial court did not dismiss Posner's action as a sanction; rather it excluded his expert's testimony because disclosure of the witness's identity and report was untimely." Id., ¶ 23, f.8. Referring to Utah R. Civ. P. 37(f), the Court went on to explain that "Utah law mandates that a trial court exclude an expert witness report disclosed after expiration of the established deadline unless the trial court otherwise chooses to exercise its equitable discretion." Posner v. Equity Title Ins. Agency, Inc., 2009 UT App 347, ¶ 8. See also Rukavina v. Sprague, 2007 UT App 331, ¶ 8 (trial court must exclude evidence if party fails to make Rule 26 disclosures and, at its discretion, may impose other sanctions).

Like the plaintiff in Posner, Lippman undisputedly designated his experts after the expert discovery deadline set forth in the Second Amended Scheduling Order. Pursuant to the Second Amended Scheduling Order, Lippman was required to disclose any expert witness reports by April 1, 2008. (R. 1101). Lippman did not disclose his expert witness reports until March 2, 2009 (R. 2322.); eleven months after the deadline. For the reasons set forth in the Posner decision, the trial court was

required, by operation of Rule 37(f), to exclude Lippman's tardy expert witness reports unless the court found that the failure to disclose was harmless or that there was good cause for the failure. Finding no good cause for the unreasonable delay, the trial court followed Rule 37(f), excluded Lippman's late-designated experts and reasonably denied Lippman addition time to make his expert designations.

B. The Trial Court's Denial of Lippman's Third Motion to Amend Scheduling Order Was Not Tantamount to Dismissal.

Footnote eight of the Posner decision is dispositive of Lippman's claim that the denial of his Third Motion to Amend Scheduling Order was tantamount to a dismissal and possibly a violation of his due process. Posner made the same argument, to which this Court responded:

> Posner mischaracterizes the trial court's actions: the trial court did not dismiss Posner's action as a sanction; rather it excluded his expert's testimony because disclosure of the witness's identity and report was untimely. It was the absence of expert testimony, not a sanction by the trial court, that led to the dismissal of Posner's claim.

Posner v. Equity Title Ins. Agency, Inc., 2009 UT App 347, ¶ 23, f.8.

Here, Lippman similarly mischaracterizes the lower's court's actions. Lippman's experts were excluded as a result of his failure to timely disclose their identities and reports. In the event that Lippman's claims are eventually dismissed by the lower court as a result of the absence of expert testimony, it will be that absence of expert testimony, and not a sanction by the trial court, that causes the dismissal.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING LIPPMAN'S THIRD MOTION TO AMEND GIVEN THAT THE MOTION WAS UNTIMELY, THE COURT FOUND NO GOOD CAUSE TO EXCUSE LIPPMAN'S FAILURE TO TIMELY DESIGNATE HIS EXPERTS, AND THE COURT FOUND GRANTING LIPPMAN'S MOTION WOULD UNDULY BURDEN AND PREJUDICE THE PARTIES AND THE COURT.

The trial court's denial of Lippman's Third Motion to Amend must be reviewed in context with the entire history of the case. By June of 2009, this case had been pending for more than three years. The trial court aptly noted in its Order that the case was filed in 2006, that the original scheduling order had been previously extended (on multiple occasions) and that Lippman had already sought many amendments to his pleadings. (R. 2442). Notwithstanding the trial court's patience in granting Lippman several discovery extensions and opportunities to amend and refine his pleadings, Lippman nonetheless failed to timely designate his experts. Lippman then inexplicably waited almost an entire year after the expert deadline expired to even submit his motion to the trial court. The trial court articulated ample bases for finding that Lippman had failed to demonstrate that good cause existed to justify his outrageous delay. Furthermore, the trial court found that granting Lippman's motion would result in prejudice and further delay. All of these factors evidence that the trial court properly exercised its discretion in denying Lippman's Third Motion to Amend Scheduling Order.

A. Lippman's Third Motion to Amend Scheduling Order Was Not Timely as It Was Submitted Nearly One Year After the Expiration of the Expert Witness Disclosure Deadline.

Lippman would like this Court to believe that he filed his Third Motion to Amend Scheduling Order prior to the expiration of the expert witness disclosure cutoff date. (App. Br., p. 22). This is simply not true. As set forth in the Second Amended Scheduling Order, the expert witness disclosure cutoff date was April 1, 2008. (R. 1101). Lippman did not file his First Motion to Amend Scheduling Order until April 3, 2008, two days *after* the deadline. (R. 1892). While Lippman's Third Motion was ridiculously untimely, not even his First Motion was filed on time as it undisputedly came after the expert discovery deadline.

Lippman's First Motion to Amend Scheduling Order requested a sixty (60) day extension of the expert discovery deadline, or until May 31, 2008. (R. 1898). Lippman essentially abandoned his First Motion to Amend Scheduling Order and left it to languish for nearly a year. During that year, the First Motion to Amend Scheduling Order grew stale. The passage of time effectively mooted the Motion as the extension Lippman sought in the First Motion to Amend expired with no word from Lippman or his counsel. Nine months *after* the expiration of the sought-after extension, Lippman surprisingly resurfaced and submitted his now stale and mooted motion for decision. (R. 1892). With his surprise Request to Submit, Lippman also attempted to sneak the First Motion to Amend Scheduling Order past the trial court

with a modified deadline and an untimely expert designation and report. (R. 2292). The trial court saw through the ruse and understandably, would have none of it. (R.2369). The trial court denied the First Motion on the basis that it was impermissibly stale.

In an attempt to rehabilitate his credibility in front of the trial court, Lippman then filed a Second Motion to Amend Scheduling Order which he subsequently withdrew. (R. 2348 and 2374). With his Third Motion to Amend Scheduling Order, Lippman attempted to take yet another bite at the same rotten apple. (R. 2377).

Lippman continues to misrepresent his handling of the case. In his Brief, Lippman indicates that 'When faced with unforseen expert witness problems, Lippman did appropriately motion the trial court to avoid sanctions." (App. Br., p. 18). As discussed above, Lippman most certainly never appropriately motioned the trial court.

B. The Record Contains No Actual Evidence Confirming that Lippman's Alleged Expert Witnesses Cancelled at the Last Minute.

Lippman tries to take the role of victim in attempting to excuse his late disclosure. Lippman states as fact that his retained experts canceled shortly before the expert disclosure deadline (App. Br., pp. 4, 8-9, 22); however, the record contains no evidence beyond Lippman's bare allegations to support the contentions. Lippman indicates that he "unexpectedly had one of his expert witness's decide not to participate in the case right before the disclosure deadline and another witness run

into family medical issues delaying the report until after the disclosure deadline." (App. Br., p. 22). However, the record contains no letter, affidavit or other competent evidence of any kind to support these bare assertions.

Throughout this entire case, including the briefing of these three separate motions to amend the scheduling orders, neither Lippman nor his counsel have ever provided any documentation supporting his allegations of last-minute difficulties with retained experts. Likewise, counsel has never filed an affidavit attesting to these purported difficulties. Certainly something as important and necessary as expert testimony should be adequately supported and on the record. Yet, none of the allegations regarding Lippman's expert witness testimony and any supposed withdrawal or delay are supported by a shred of credible, competent evidence. Indeed, there is not a single letter, invoice, e-mail, affidavit or anything else to lend some modicum of credibility to Lippman's bare allegations.

Likewise, we have only Lippman's allegations and no affidavit to support Lippman's contentions regarding his efforts to locate a replacement expert witness after the expert witness disclosure deadline. (App. Br., p. 8-9). If Lippman was putting forth such effort to locate and retain new expert witnesses, it does not stand to reason that he would have completely failed to timely notify or advise the trial court or Coldwell Banker's counsel of both his unfortunate circumstance and his efforts to secure a replacement expert. Regardless of the veracity of Lippman's tales of woe in

locating and retaining an expert, Lippman's tardy expert disclosures should have nevertheless been rejected by the trial court. Even were the tall tales true, Lippman waited an unreasonable period of time (nearly a year after the passing of the expert discovery deadline) and then submitted his motion under false pretenses (by misrepresenting the new expert discovery deadline originally requested).

C. The Trial Court Found No Good Cause which Justified Lippman's Delay; Conversely, the Trial Court Found that Lippman's Failure to Timely Disclose His Expert Witness Reports Was Harmful and Prejudicial.

Confirming that the language of Rule 37(f) of the Utah Rules of Civil Procedure requires a trial court to exclude expert witnesses disclosed after the established deadline, the Court of Appeals notes that trial courts "have discretion to determine whether good cause excuses the tardiness or whether prejudice would result from allowing the disputed evidence at trial." Posner v. Equity Title Ins. Agency, Inc., 2009 UT App 347, ¶ 23. In its Order denying Lippman's Third Motion to Amend Scheduling Order, the trial court noted that both the trial court and Coldwell Banker would suffer prejudice if the late expert designations were allowed.

The Scheduling Order and the multiple subsequent amendments to such allowed Lippman more than ample time to both designate his expert witnesses and file their reports. Coldwell Banker timely complied with the Second Amended Scheduling Order and disclosed both of its experts in April of 2008. Lippman proposed and agreed to the expert witness deadlines contained in each of the

scheduling orders, yet he failed to comply. (R. 0450, 0614 and 1099). Later, Lippman failed to timely move the trial court to extend the expert discovery deadline. When Lippman finally moved the Court to extend the expert discovery deadline (R. 1892), he failed to follow through and timely submit the motion.

Coldwell Banker reasonably believed that Lippman had abandoned his First Motion to Amend Scheduling Order as nearly a year passed without the submission of the Motion or the filing of any expert witness reports. Then, almost one year after filing the First Motion to Amend Scheduling Order, Lippman attempted to submit the then-stale Motion. (R. 2295). Lippman underhandedly presented the trial court with a proposed Order that included dates almost one year past the dates actually requested in the Motion. (R. 2292). Coldwell Banker objected to the proposed Order and the trial court swiftly denied the First Motion to Amend Scheduling Order. (R.2369). Lippman filed and then promptly withdrew a Second Motion to Amend Scheduling Order. (R. 2374). Lippman then filed, nearly one year after the expiration of the expert witness deadline, a Third Motion to Amend Scheduling Order. The trial court reviewed the motion, held a telephonic scheduling conference with all counsel present to discuss the case and all pending motions and then subsequently acted reasonably in exercising its equitable discretion when it denied the Motion.

Certainly, Coldwell Banker would suffer prejudice if Lippman were allowed to identify and use its inappropriately designated expert witnesses at such a late date.

Coldwell Banker complied with the Second Amended Scheduling Order. Coldwell Banker has already incurred much time and expense defending this three-year-old litigation. Coldwell Banker reasonably formulated its defense based upon the facts, witnesses and information timely disclosed. Coldwell Banker relied upon Lippman to comply with the Utah Rules of Civil Procedure and to timely provide all material information during fact and expert discovery. Instead, Lippman attempted to ambush both Coldwell Banker and the trial court with his belated and surprise expert witness designations filed together with a bogus proposed Order. (R. 2322 and 2292).

As far as Coldwell Banker and the trial court understood, Lippman took absolutely no action in the case as to any expert witnesses for nearly one year after the expert disclosure deadline. Lippman, not Coldwell Banker, should bear the consequences for his failure to dutifully pursue his claims, including the consequences for his failure to timely designate his expert witnesses. It would be unjust to allow Lippman's much belated expert designations or witness reports.

D. Lippman's Lack of Leniency Towards the Deem Defendants was Just One of the Many Factors Cited in the Trial Court's Order.

Lippman dedicates a large portion of his Brief addressing the Deem Defendants and his previous Motion for Summary Judgment against them. (App Br., pp. 13--19). Lippman contends that the trial court's denial of his Third Motion to Amend Scheduling Order is "based upon" the trial court's earlier ruling on Lippman's Motion for Summary Judgment against the Deem Defendants. (App. Br., p. 16).

It is clear from a reading of the subject Order that the trial court did not base its denial of Lippman's Third Motion to Amend Scheduling Order on the success of Lippman's earlier Motion for Summary Judgment against the Deem Defendants. (R. 2441). While the trial court's Order did indeed refer to Lippman's earlier summary judgment against the Deem Defendants, the reference was offered only to confirm the consistency with which the trial court enforced its scheduling orders and the Utah Rules of Civil Procedure against all parties in this case. For this reason, the trial court noted in its Order that Lippman had "been very dogmatic in requiring other parties to adhere to deadlines[]" (R. 2441).

In addition to pointing out its consistency in enforcing the rules and scheduling orders, the trial court also detailed the numerous other reasons for which it denied Lippman's Third Motion to Amend Scheduling Order. (R. 2441). The trial court noted obviously that the Motion was not timely as it was filed nearly one year after the expert deadline; that Lippman had already been granted previous extensions; that the Third Motion to Amend Scheduling Order did not request a particular date for the extension of time[2]; that the granting of another extension would cause prejudice, including additional expense and delay; and that the case was filed in 2006. (R. 2441).

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Rule 7(b)(1) of the Utah Rules of Civil Procedure states in part that "[a] motion shall . . . state succinctly and with particularity the relief sought." URCP 7(b)(1) (2009). In his Third Motion to Amend Scheduling Order, Lippman did not request a specific date for the extension of the expert witness discovery. (R. 2377).

In exercising its *equitable* discretion, the trial court may well have considered Lippman's Draconian and dogmatic lack of leniency juxtaposed with his untimely request for additional time. However, the trial court's Order makes clear that it considered this as only one of several factors when it denied Lippman's Third Motion to Amend Scheduling Order. Lippman's contention that his Third Motion was denied based solely on the fact that Lippman previously prevailed against the Deem Defendants on summary judgment ignores the evidence, the record and the Court's own reasoning set forth in its Order. (R. 2441).

III. LIPPMAN FAILED TO MARSHAL THE EVIDENCE SUPPORTING THE TRIAL COURT'S DENIAL OF LIPPMAN'S THIRD MOTION TO AMEND SCHEDULING ORDER.

It is unclear whether Lippman is challenging a factual finding by the trial court. Lippman indicates that "the trial court ignored may [sic] important facts that had direct relation to making a decision and got some of the facts wrong." (App. Br., p. 16). However, Lippman does not identify the particular facts. Regardless, the trial court found that Lippman's Third Motion to Amend Scheduling Order was without merit and would result in prejudice.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure indicates in part that "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." Utah R.App. P. 24(a)(9) (2009). See also Fisher v. Fisher, 907 P.2d 1172, 1178 (Utah App. 1995); Wilde v. Wilde, 969 P.2d 438, 444

(Utah App. 1998). Lippman failed to marshal the evidence supporting the trial court's findings which support the denial. When the challenging party fails to comply with the marshaling of the evidence , the reviewing court will generally presume that the record supports the trial court's factual findings. State v. Chavez-Espinoza, 186 P.3d 1012 (Utah 2008). See also Martinez v. Media-Paymaster Plus, 164 P.3d 384 (Utah 2007). The Court of Appeals has made clear that the burden is on the appellant to marshal all of the evidence, in comprehensive and fastidious order, which tends to support the trial court findings. State v. Martinez, 47 P.3d 115 (Utah App. 2002); Interiors Contracting, Inc. v. Smith, Halander & Smith Associates, 881 P.2d 929 (Utah App. 2002). Lippman failed to meet his burden and has therefore provided this Court with another reason to affirm the trial court. Id.

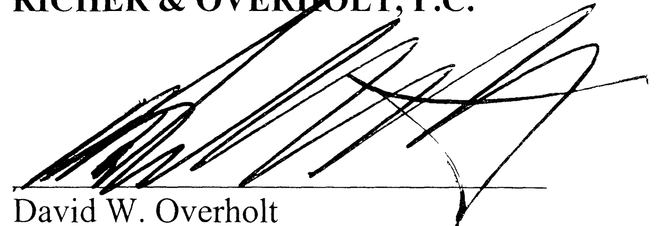
CONCLUSION

The trial court properly excluded Lippman's late-designated expert disclosures and property denied Lippman's Third Motion to Amend Scheduling Order. Lippman unequivocally failed to comply with the Second Amended Scheduling Order and did not motion for additional time until well after the established deadline had expired. Lippman then impermissibly waited an additional year before requesting a decision on his then stale and mooted motion. Dealing with the parties first hand, the trial court reasonably exercised its equitable discretion when it denied Lippman's Third Motion to Amend Scheduling Order.

Accordingly, Coldwell Banker respectfully requests this Court to affirm the trial court's order denying Lippman's Third Motion to Amend Scheduling Order.

DATED this 8th day of December, 2009.

RICHER & OVERHOLT, P.C.



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Banker Residential Brokerage Company

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2009, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEES, OWEN SALKIN AND COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY** to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

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